No. 12,425

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

WALTER L. PENDERS and FLORA PENDERS,
Appellees.

BRIEF FOR APPELLANT.

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JURISDICTIONAL STATEMENT.

This action was instituted in the United States District Court for the Northern District of California, Southern Division, under the Federal Tort Claims Act, 28 U.S.C., Sections 1346(b), 2671-2680. Following trial and judgment this appeal was commenced in the Court of Appeals for the Ninth Circuit pursuant to Rule 73, Federal Rules of Civil Procedure, and U.S.C. Title 28, Sections 1291 and 1294.

STATEMENT OF THE CASE.

(All page references are to printed Transcript of Record unless otherwise noted.)

Nature of case.

On May 11, 1946, at about 6:40 P.M., in Monterey, California, Walter L. Penders, appellee, was driving with his wife, Flora Penders, as a passenger, in his sedan in an easterly direction on Fremont Street, a four-lane highway divided by a double white center line, toward the intersection of Fremont Street and Park Avenue, a two-lane street. It was daylight, with the weather clear and dry.

Fremont Street runs in a generally east and west direction. Park Avenue runs generally north from the intersection on the north side of Fremont Street. Park Avenue does not cross Fremont Street. At least 100 feet west of the Fremont and Park Avenue intersection Walter L. Penders left the eastbound southerly half of Fremont Street and traveled the remaining distance toward the Park Avenue intersection on the wrong side of the road, i.e., on his left of the center double line and in the *westbound* traffic lanes. (Tr. 138, 155 and 218.) While thus on the wrong side of the roadway, Penders' automobile came into collision with a United States Army panel truck driven in a westerly direction along Fremont Street by Carl B. Wanless, a soldier on authorized Government business.

The collision between Penders' sedan and the Army truck was virtually head on. (Tr. 211.) The impact occurred in the most northerly westbound lane of Fre-

mont Street, approximately forty feet to the west of the Park Avenue intersection. (Tr. 101.)

In the collision both Walter L. Penders and Flora Penders were injured.

Walter L. Penders, seventy-nine years old at the time of the accident (Tr. 219 and 240) suffered a fractured left wrist and fractured left tibia just below the knee. (Tr. 23, VII Finding and Tr. 213-214.) Flora Penders, seventy-seven at the time of the collision (Tr. 71), suffered internal injuries in the accident and subsequently died. (Tr. 24 and 25, XI and XII Findings and Tr. 215 to 217.) At the time of the accident Walter L. Penders was retired. (Plaintiff's Exhibit "B".)

Proceedings in trial Court.

Appellee Walter L. Penders and his wife Flora Penders filed their complaint for damages on May 9, 1947. On April 14, 1949, an "Amendment to Complaint" was filed alleging that on April 10, 1949, Flora Penders died of the injuries alleged in the original complaint and praying for $20,000 general damages for the death of Flora Penders. (Tr. 14.)

After trial the Honorable District Court on June 3, 1949, ordered judgment in favor of appellee Walter L. Penders, awarding damages as follows:

Special damages, medical care of Flora Penders	$17,767.19
Special damages, medical care of Walter L. Penders	5,181.49
Damages to Walter L. Penders' automobile	150.00
General damages to Walter L. Penders for injuries to himself	15,000.00
General damages to Walter L. Penders for loss of his wife, Flora Penders	15,000.00
Total damages	$53,098.68

(Conclusions of Law II, Tr. 27.)

QUESTIONS RAISED ON APPEAL.

Three questions raised on this appeal are:

1. Did the trial Court err in its conclusion of law that the Government driver Wanless was negligent?

2. Did the trial Court err in failing to find that appellee was guilty of contributory negligence?

3. Did the trial Court award excessive damages?

Appellee respectfully submits that each and every one of these questions must be answered affirmatively and the decision of the trial Court should be reversed.

ARGUMENT.

I.

THE TRIAL COURT'S CONCLUSION OF LAW THAT THE GOVERNMENT DRIVER WANLESS WAS NEGLIGENT IS NOT SUPPORTED BY THE EVIDENCE.

The Honorable Trial Court reached the following conclusion of law:

"That defendant, United States of America, was negligent in the manner in which it operated and controlled its 1941 Chevrolet panel truck, which said negligence proximately caused the injuries and damage to plaintiff." (Conclusions of Law II, Tr. 27.)

This conclusion of law appears to be based upon the specific findings of fact made by the trial Court respecting the negligence of the Government driver Wanless. It is appellant's contention that the specific findings of fact made by the trial Court regarding the negligence of Wanless constitute inferences which as a matter of law are not supported by the evidence before the trial Court and now before the Honorable Court of Appeals.

Unquestionably the only finding of fact by the Honorable Trial Court justifying the conclusion of law set forth above is Finding V. (Findings of Fact and Conclusions of Law, Tr. 21-23.)

The substance of Finding V in respect to the negligence of Wanless may be paraphrased as follows:

(1) At the time of the collision Wanless was operating the Government panel truck at an excessive rate of speed. (Tr. 22, lines 6-8.)

(2) Wanless was careless in not keeping a proper lookout, thereby failing to see appellee's automobile until Wanless was approximately 80 feet distant from the intersection of collision. (Tr. 22, lines 10-15.)

(3) Wanless on first seeing appellee's automobile, negligently turned the Government panel truck to the right and struck appellee's car. (Tr. 22, lines 29-30 and 23, lines 1-5.)

It is respectfully submitted that each of the above three findings of fact is not supported by the evidence, for the reasons hereinafter set forth, as a matter of law.

At the outset, however, appellant readily concedes that generally speaking the findings of fact made by a trial Court cannot be disturbed upon appeal unless there is a clear and convincing showing that the findings attacked do not have adequate support in the evidence considered by the trial Court and before the appeal Court. It is appellant's belief that a review of the findings of fact here questioned, however, and a comparison of these findings with the evidence in this case lead inevitably to the conclusion that these findings of fact are erroneous and the trial Court's conclusion of law based thereon, constitutes reversible error.

Gates v. Gen'l. Casualty Co., C.A. 9, 120 F. (2d) 925;

Crawford v. Southern Pacific (1935), 3 C. (2d) 427 at 429;

Jacoby v. Johnson (1948), 84 C.A. (2d) 271.

There is no doubt that where the Appellate Court finds in the record on appeal evidence which constitutes irrebuttable proof that the trial Court's findings of fact have no basis in fact or in *reasonable* inference, the Appeal Court is compelled to disturb the findings and, if appropriate, may reverse the trial Court decision.

> *Pacific American Fisheries v. Hoof,* 44 S. Ct. 38, 263 U.S. 712, 68 L. Ed. 520.

Appellant respectfully submits that this is such a case and presents the following analysis of evidence which was before the trial Court and is now before the Honorable Appellate Court in support of this contention.

(1) Excessive speed.

Finding V of the trial Court refers to Wanless' speed in the following language:

> "That it is true that at said time said defendant, Carl B. Wanless, was operating the aforesaid automobile at an excessive rate of speed;" (Supra).

This finding says nothing about *how* Wanless' speed was excessive. Testimony by a police officer (Tr. 194) showed that the speed limit in the vicinity of the accident was 55 miles per hour.

Witnesses testifying as to how fast Wanless was driving prior to the accident said he was going from 35 to 40 MPH. Hartshorn, eye-witness to the accident, said "rapid rate". (Tr. 126.) Wanless himself said 35 to 40 MPH. (Tr. 266.) Only the appellee testified

that Wanless was driving more than 35-40 MPH. Appellee thought Wanless was going "70-80 MPH". (Tr. 254.) It must not be overlooked, however, that appellee was hardly in a position to observe accurately how fast Wanless was driving, since appellee's and Wanless' vehicles were moving head on prior to impact. It would seem, therefore that the most reliable evidence before the trial Court on the question of Wanless' speed, estimated it at 35 to 40 miles per hour.

Assuming that 35 to 40 miles an hour was Wanless' speed prior to the accident, it would appear as a matter of law that since the applicable speed limit was 55 MPH, Wanless could not have been operating at an "excessive speed". Certainly, in ordinary circumstances, operation *below* the legal speed limit does not constitute "excessive speed". Undoubtedly, however, peculiar circumstances might make *any* speed "excessive", no matter how far below the speed limit. On an icy road, for example, or on a day with low visibility, operating below the speed limit might easily be excessive. In the case before the Honorable Appellate Court, however, no peculiar road conditions are detailed in the trial Court's findings to justify the inference that Wanless was operating at "Excessive Speed". The evidence shows without contradiction that the day was fair, visibility excellent and roadway dry. (Tr. 97.) In short, no persuasive evidence is found that Wanless' speed was in fact excessive.

Appellee may argue, of course, that Wanless' speed was excessive *because* if it had not been excessive Wanless would not have struck appellee's car. Such

an argument cannot be taken very seriously in view of the wording of Finding V (supra) in respect to "excessive speed". To support such an argument it would be essential that Finding V contain a specific finding that "excessive speed" proximately caused the collision. Actually, Finding V does not state that Wanless' "excessive speed" was the cause of any result. Rather, it appears that "excessive speed" is a kind of editorial comment by the trial Court in preface to the asserted negligence of Wanless, which the trial Court expressly states was the cause of the collision. It must be emphasized that while Finding V does not state that "excessive speed" was the cause of any result, the same finding expressly characterizes as negligence Wanless' alleged failure to keep a lookout and his turning to the right upon seeing appellee's car, positively stating that the latter of these negligent acts (Wanless' negligently turning right), caused the collision.

We have proceeded in this argument thus far on the assumption that Wanless' speed was *not* excessive. Even if we assume, however, that Wanless' speed was in fact excessive, a finding of fact that it was excessive, in the absence of a finding of fact that excessive speed constituted negligence and caused this collision, cannot support the trial Court's judgment in this case. The California cases have long held that a mere showing of excessive speed without facts establishing that such speed was negligent, does not justify judgment for a plaintiff collision victim. California Vehicle Code 511 reflects this rule in providing violation of a

prima facie speed limit does not establish negligence as a matter of law.

(2) Wanless' lookout.

Finding V states:

"Carl B. Wanless operated said automobile without due care and caution in that although his vision was unobscured, said defendant, Carl B. Wanless, did not observe said plaintiff's automobile until he was approximately 80 feet distant from the intersection * * *"

In contrast to the trial Court's reference to "excessive speed", Wanless' alleged failure to keep a lookout is expressly characterized as negligent, but, as in the case of Wanless' asserted excessive speed, Wanless' failure to keep a lookout is *not* given as a cause resulting in the collision. The fact that the trial Court did not regard Wanless' claimed failure to keep a lookout as the cause of the collision might, of itself, be deemed more than adequate to support appellant's contention that Wanless committed no actionable negligence in respect to lookout. But we believe that the Appellate Court should be informed as to the relation between the finding of failure to keep a lookout and the only evidence regarding lookout in the record.

The record discloses that no one testified that Wanless was *not* maintaining a proper lookout. The testimony of Hartshorn, the eye-witness, comes closest to fully credible testimony regarding Wanless' lookout. Hartshorn was driving a bus, proceeding in the same direction as appellee. Hartshorn stated that just be-

fore the accident he was driving behind appellee for some distance, and having a line of vision 8 feet above road level, he was able to see further ahead than appellee. (Tr. 119.) Just before the collision Hartshorn saw Wanless' panel truck coming from the opposite direction. (Tr. 124.) Hartshorn estimated that when he first observed the oncoming panel truck it was approximately 175-200 feet east of the intersection. (Tr. 125.) This distance is highly significant, since Finding V expressly states that "It is true that said intersection of Fremont Street and Park Avenue was visible for a distance of approximately 150 to 175 feet to a person approaching said intersection from the *westerly* direction." (Tr. 22, lines 15-19.) We italicize the word "westerly" because it would appear that it is a misprint in the printed Transcript of Record and should be "easterly", since Wanless was approaching from the east.

To continue our analysis of Hartshorn's testimony, this witness stated that after he first sighted Wanless' oncoming panel truck, when Wanless was "a good 175 to 200 feet the other side" of the intersection (Tr. 125) he observed:

> "Well, as it came up, the closer it got, I could see that he *had noticed* the vehicle in the street, the other vehicle. You could tell that he was applying the brakes because the Army vehicle was, you could tell that he was putting on brakes, not, because the Army vehicle * * *" (Tr. 127.) (Emphasis ours.)

The only meaning that the quoted testimony can possibly have is that contrary to Finding V's implication of improper lookout, Wanless must have perceived appellee's vehicle at or about exactly the time when it was first visible to Wanless. We agree entirely with the trial Court's Finding V, that apellee's car could not possibly be visible to Wanless sooner than the instant when Wanless reached a point 150 to 175 feet from the Fremont and Park intersection. The above-quoted testimony of Hartshorn is uncontradicted, and being the *only* evidence on the subject of lookout besides the corroborating testimony of Wanless himself (Tr. 266), precludes the inference contained in Finding V that Wanless was careless in not keeping a proper lookout.

In addition to the fact that all the testimony regarding lookout establishes a proper lookout by Wanless, it is respectfully submitted the physical facts of the collision confirm appellant's contention hereinafter that a proper lookout was in fact maintained by Wanless.

Finding V, quoted above, expressly states that Wanless first observed appellee's car approximately 80 feet distant from the intersection (supra). Assuming "intersection", as employed in Finding V, in respect to Wanless' lookout, means the center of the intersection of Park Avenue and Fremont, the physical evidence of the collision irrefutably establishes that Wanless *must* have seen appellee's car long before he reached a point "approximately 80 feet distant from the intersection". If it is *true* that Wanless saw ap-

pellee's car when Wanless was 80 feet from the intersection, it is difficult, if not impossible, to explain how Wanless' panel truck left *102* feet of skidmarks. It cannot be considered probable that Wanless put his brakes on *before* he saw appellee's car. The skidmarks were measured from point of origin to the point where Wanless' panel truck came to rest after the collision. (Tr. 83, 98.) One might argue that Wanless may have put his brakes on at the point 80 feet from the intersection and nevertheless produced skidmarks of 102 feet because the cars after collision might have traveled the additional distance representing the difference between 80 and 102, or 22 feet after impact.

Such an argument would have to overlook a fundamental premise of the trial Court's conclusion of law that Wanless' negligence, and not appellee's, was legally responsible for the collision. This fundamental premise, expressed in Finding XVI, which exculpates appellee from any carelessness and negligence, is that appellee was in the intersection in *proper position* for a left-hand turn at the time of the collision. If it is true that appellee was in the intersection in a proper position for a left-hand turn, according to the requirements of California Vehicle Code 540(b), it follows that the point of impact was *east* of the center of the intersection of Pine and Fremont and that after impact both vehicles must have moved no more than approximately 22 feet west of the center of Park Avenue intersection. Assuming the first point at which Wanless saw appellee's car was 80 feet from the center of Park Avenue (as Finding V asserts), and as-

suming further than when first seen by Wanless, appellee's car was in the act of completing its left-hand turn, by implication *legally,* i.e., turning left properly in the eastern half of the intersection, as asserted by Finding V: "said plaintiff was in the act of completing his turn and was in the outer westbound lane of Fremont Street", the only way in which these two assumptions can be reconciled with the measured skid-marks of 102 feet, is to establish by competent evidence, that the vehicles came to rest approximately 22 feet west of the point of impact. But the physical evidence of the collision recorded immediately after the accident by a police officer experienced in recording such data, shows that the vehicles were found at rest after collision more than 53 feet from the center of Park Avenue. (Testimony of Police Officer Davenport, Tr. 99-100.)

Does the evidence show how far after impact the vehicles moved? Once again resort must be had to Hartshorn, the bus-driver eye-witness. Hartshorn, whose testimony, it may be observed, was generally favorable at the trial to appellee's case, was unable to estimate exactly how far the vehicles moved after impact. (Tr. 128-129.) His final estimate, after questioning by the trial Court, was "about 15 feet". (Tr. 129.) In other words, the only evidence of how far the cars actually did move after impact showed approximately no more than one-third of the distance the cars would have moved if the trial Court's Finding V were correct in respect to the inference that Wanless first saw appellee's car when Wanless was

only 80 feet distant from the intersection and appellee's car. Such a wide discrepancy, over 45 feet, between the distance the cars moved after impact and the distance they *ought* to have moved if Finding V were correct, about the distance at which Wanless first saw appellee's car, suggests that Finding V is clearly erroneous in its inference as to what lookout Wanless kept.

(3) Wanless' right turn.

The concluding act of negligence charged against Wanless by Finding V is detailed in these words:

> "That it is true that defendant, Carl B. Wanless, on first observing plaintiff's said automobile, then and there negligently and carelessly turned the vehicle which he was then and there operating to the right and struck plaintiff's car at the right front portion thereof, at a point north of the northerly line of the outer west bound lane of Fremont Street."

In the above-quoted portion of Finding V we have the ultimate conclusion of Finding V, and, so to speak, a dramatic full flowering of negligence. The Honorable Trial Court in this final clause regarding Wanless' right turn brings to a resounding climax the hints of culpable negligence suggested in Finding V's references to Wanless' purported excessive speed and improper lookout. Wanless' "excessive speed" was not labeled negligent, but merely mentioned as a kind of overture to negligence. (Supra.) Wanless' "improper lookout" following the asserted excessive speed is forthrightly identified as negligent in the next princi-

pal clause of Finding V. (Supra.) But, as in the case of "excessive speed", even though termed "negligent", Finding V's inference of improper lookout does not provide any legal basis for the conclusion of law that Wanless was *culpably* negligent, since the trial Court does not infer that failure to observe caused the collision.

Finding V in its ultimate accusation of a negligent turn to the right, provides exactly the missing legally actionable accusation of negligence. For Finding V states that Wanless' right turn on first observing appellee's car was careless, and thereupon Wanless struck appellee's car.

It is respectfully submitted that if all the inferences preceding this ultimate inference of a negligent right turn in Finding V *are* true, then the trial Court's inference that Wanless negligently and carelessly turned right must be false. This is particularly true in respect to the inference in Finding V that "when defendant, Carl B. Wanless, first observed said plaintiff's automobile, said plaintiff was in the act of *completing his turn and was in the outer west bound lane of Fremont Street;* that it is true that said defendant, Carl B. Wanless, did not observe plaintiff's extended arm;". (Emphasis added.) The plain meaning of this statement from Finding V is that when Wanless first saw appellee's car it must have appeared clearly and evidently to be in the process of completing a left-hand turn. In considering this portion of Finding V we must assume that "completing" means

completing in a proper and legal manner in order to be consistent with Finding XVI, which expressly states that appellee was not negligent. But if the inference is correct that Wanless turned right when he saw appellee completing a left turn, it would be reasonable, indeed inevitable, that the evidence of the physical data of the collision would bear out this inference by the trial Court. Far from bearing out this inference, however, we find that the physical data of the collision point to an entirely different inference (see appellee's contributory negligence), and leads us to infer, either

(1) When first seen by Wanless appellee could not have been "in the act of completing his turn", or

(2) If appellee was "in the act of completing his turn", his turn could not have been proper and legal according to established standards of due care under California Vehicle Code 540(b). California Vehicle Code 540(b) reads:

"* * *

(b) Left Turns on Two-way Roadways. At any intersection where traffic is permitted to move in both directions on each roadway entering the intersection an approach for a left turn shall be made in that portion of the right half of the roadway nearest the center line thereof and by passing to the right of such center line where it enters the intersection and after entering the intersection the left turn shall be made so as to leave the intersection to the right of the center line of the roadway being entered."

A brief discussion of the two above suggested "either or" alternatives may be of considerable benefit in exposing the error which appellant asserts exists in Finding V's concluding inference that Wanless negligently turned right and struck appellee when appellee was completing a left turn. The first alternative is that appellee could not have been in the act of *completing* his turn. If the word "completing" means to finish, or to do the final acts necessary to make a left turn, there should be ample evidence of an irrebuttable nature in the record on this point. The record is replete, of course, with testimony regarding appellee's completion of his left turn just before the collision. Certainly the most favorable construction placed upon appellee's own testimony leaves no doubt that in appellee's opinion his car was struck while *completing* a left turn. (Tr. 210.) We believe, however, that this testimony and all other testimony to the effect that appellee's car was completing a left turn when hit, must be disregarded in its entirety in the face of photographic evidence presented by appellee.

At the trial the appellee placed in evidence photographs of the vehicles after the accident. (Tr. 81.) Appellant believes that these photographs, notably Plaintiff's Exhibits 17, 18, 19 and 20, as will be shown hereinafter, conclusively establish that at the time appellee's car was struck it could not have been in the process of *completing* a left turn.

Granting that "completing" was used by the trial Court in its ordinary sense, as suggested above, these

photographs should present pictures of physical evidence, *conclusive* proof, that appellee's car was struck in the process of completing a left turn. To the contrary, these pictures, analyzed most favorably for appellee, show appellee's car, at the very most, was *commencing,* and at that barely commencing, its left turn. Examination and careful reflection upon the contents of these photographs, together with a comparison of their contents with the admitted circumstances of this collision, will show why appellee's car was in fact *not completing* a left turn when struck.

Let us start with the admitted circumstances of the accident: it is admitted that appellee was driving east, appellant west. Let us admit appellee at some time immediately prior to the accident signaled to indicate he intended to make a left-hand turn, a turn to the north. The highway from which appellee was to make his left turn was a four-lane highway. An automobile being turned left from a four-lane highway may reasonably be regarded as completing its left turn when its front wheels enter the northernmost lane of the highway. Certainly the trial Court's Finding V implies that appellee's position in the "outer west bound lane" (which would be the northernmost lane) must be some indication that appellee was "completing" his left turn.

If we assume that just as appellee's car turning left is completing its turn, it is struck by a car moving west, which is certainly conceded by all the evidence

in this case, it would necessarily follow that the car completing its left turn would be struck on its right side. Plaintiff's Exhibit 20, however, as the Appellate Court will perceive, shows appellee's vehicle to be virtually undamaged on its right side. There is no visible damage on the right side of appellee's vehicle further back than the engine cowl, save a scratched and dented spot on the right side of the car above the right side rear window. From the front edge of the door on the right side of appellee's car to the furthermost rear tip of its right rear fender there is no physical evidence that the Government panel truck struck appellee's car on the right side in the manner in which appellee's car would have been struck if completing a left turn. (Plaintiff's Exhibit 20.) It is our conclusion from this photograph that when struck, appellee could not have been "completing" his left turn in the sense of finishing his turn or doing the final acts necessary for a left turn from a four-lane highway. We submit that this photograph shows physical evidence entirely inconsistent with the trial Court's inference that appellee was "completing" his left turn when hit.

Galloway v. U.S., 9 C., 1942, 130 F. (2d) 467. Affirmed 1942; 63 S. Ct. 1077; 319 U.S. 372, 87 L. Ed. 1458; rehearing denied 1942; 63 S. Ct. 1443; 320 U.S. 214, 87 L. Ed. 1851.

Justice Rutledge observes in the *Galloway* case (319 U.S. 372 at 387):

> "No case has been cited and none has been found in which inference, however expert, has

> been permitted to make so broad a leap and take the place of evidence, which according to all reason must have been at hand."

Similarly in the case at bar, the inference of the trial Court that appellee was "completing" his left turn, cannot take the place of physical evidence, embodied in the plaintiff's photographs in evidence, showing appellee could not have been completing his turn when hit.

The second alternative suggested above, namely, that perhaps the trial Court used the words "completing his turn" to refer not to a *proper* left turn from a four-lane highway, but rather the *particular* left turn which appellee was in fact endeavoring to make at the time of the accident. It is quite conceivable that the trial Court meant "completing his turn" to describe a left turn commenced by appellee from some point other than a point in the southern half of the four-way lane highway here involved. If such is the meaning of "completing his turn", appellee's car at the time of impact would be in an entirely different position than that of a car completing a left turn commenced in the left south half of this four-lane highway. Plaintiff's Exhibit 19, showing the left side and front of appellee's car after the collision shows that it is possible the words "completing his turn" refer to the completing of a turn commenced somewhere in the northern or *wrong* side of this four-lane highway. Plaintiff's Exhibit 19 (compare Plaintiff's Exhibit 20) shows the left side of appellee's car was

virtually undamaged. The left side of appellee's car is almost without a scratch so far as this photograph (Exhibit 19) shows. But the interesting thing about Plaintiff's Exhibit 19 is that when taken together with Plaintiff's Exhibit 20, it provides irrebutable physical evidence that this collision was *head on* with at most a mere tendency to the right front of appellee's car. Thus the right front tire of appellee's car is flat, the left front tire does not appear to be.

These two pictures (Plaintiff's Exhibits 19 and 20) provide convincing physical evidence that if when struck appellee was "completing his turn", that turn must have been an improper left turn commenced somewhere in the northern half of the four-lane highway. Indeed, we might observe, these two pictures clearly suggest that "completing his turn" is a misdescription. These pictures imply conclusively that rather than completing his turn, appellee *must have been commencing his turn when struck.*

We believe that it would be an imposition upon the Appellate Court to review all of the oral testimony of each of the witnesses who testified as to the position of appellee's car when struck and who testified that appellee was *completing* his turn when struck. (See appellee's own testimony in this regard, Tr. 210.) As a matter of fact, both appellee and eyewitness Hartshorn testified appellee was completing his turn when hit. (Tr. 210, 244, 257, appellee's testimony; 120, 128, 129 Hartshorn testimony.) Both of these witnesses were impeached, however, and only the trial Court

which heard them testify can say whether the version they told on the trial or their prior conflicting statements are the most credible accounts of the accident. (Hartshorn, Tr. 136-7; appellee, Tr. 238 et seq.) Appellant respectfully submits, however, that regardless of what the testimony was by either appellee or Hartshorn, the true account of what happened in this accident is properly deduced from appellee's own exhibits (Plaintiff's 19 and 20). In these pictures the camera recorded permanently an unchanging record of what *did* happen, not what this or that witness thinks happened.

It has long been the rule that physical evidence cannot be contradicted by the conflicting testimony of witnesses, however well qualified.

U. S. v. Galloway, supra.

Also see

Oklahoma Ry. v. Ivery, Okla. 1949, 204 P. (2d) 978 at 980,

(involved use of photographs to show physical evidence.)

Stolte v. Larkin, 1940, 8 C., 110 F. (2d) 226 at 229:

"Generally when undisputed physical facts are entirely inconsistent with and opposed to testimony necessary to make out a case for the plaintiff, the physical facts must control and the jury cannot return a verdict based upon oral testimony flatly opposed to physical facts."

See also

American Car and Foundry v. Kinderman, 8 C., 1914, 216 F. 499, 502;

Lee Way Motor Freight v. True, 10 C., 1948, 165 F. (2d) 38.

What *did* happen? As stated above, appellant respectfully submits that Plaintiff's Exhibits 19 and 20 show conclusively that it cannot be true that appellee was "completing" a legal left turn when his car was struck. What is the significance of this fact? It is significant because since appellee was not *completing* his turn when struck, Wanless *a fortiori* could never have observed appellee in the act of *commencing* a left turn. Appellant's contention in this respect is supported by the trial Court's own finding that "Wanless did not observe plaintiff's extended arm" signaling for a left turn. (Finding V, lines 24-25.) What Wanless must have observed, it is submitted, must have been what Wanless said he observed. Wanless testified:

> "As I drove west on Fremont Street, I came over the slight hill there and I noticed this other car just crossing the center line into my line of traffic; I would say he was, oh, at least 150 feet, or maybe 175, and he kept coming over at an angle into my lane, so I cut over further towards the outside lane, and I noticed that he still kept coming over at an angle, so I went as close to the curb as I dared and we hit head on there." (Tr. 266.)

Plaintiff's Exhibits 19 and 20 confirm this testimony. Indeed, Plaintiff's Exhibits 17 and 18 likewise re-

inforce this testimony. Exhibits 17 and 18 show the vehicles after the collision from a position in front of them. These pictures, 17 and 18, show the uniformity of damage to the front end of the Government panel truck, the uniform front end damage to appellee's car and the relative position of the cars after collision. Note that both vehicles rested on all four wheels after the collision, note that the front end of appellee's car was over the North Fremont Street curb, and finally note the proximity of the fronts of both cars to each other. It is respectfully submitted that these four photographs speak more convincingly than any witness produced by appellee and positively refute the inferences of Finding V that Wanless observed appellee *completing* his turn and carelessly turned right to cause this collision. Under the authority of the cases cited above, the physical facts established by these photographs must prevail over contrary testimony.

We have stated above that Wanless could not have observed appellee either completing or commencing his turn. There is no question that Wanless *did* observe appellee's car before the collision, evidence the skidmarks (supra). But what did Wanless observe appellee to be doing before the collision? We submit that Wanless observed appellee headed straight for Wanless, that and nothing more, whereupon Wanless endeavored to avoid a head on collision.

Can there be any serious question that confronted with a possible head-on collision, Wanless was faced with an immediate peril, an emergency? To ask this

question is to answer it. Wanless was faced with an emergency and he reacted as fast and as well as his capacities permitted. There is no evidence whatsoever that he debated with himself as to what he would do—he says himself he "cut over further towards the outside lane". (Tr. 266.) To infer that such conduct amounts to carelessness and negligence, as did the trial Court in Finding V, is to disregard the long-standing and frequently-observed rule of the California Courts that acts in an emergency intended to avert catastrophe which in fact cause the very catastrophe sought to be escaped, cannot constitute negligence. The soundness of this rule is self-evident. No man should be penalized because his quickest thinking in time of emergency does not coincide with the thoughts of counsel for plaintiff. See

Stolte v. Larkin, supra, at 230.

A recent California decision is

Stickel v. Durfee, 1948, 88 C.A. (2d) 402, 199 P. (2d) 16.

Appellant submits that in the instant case Wanless, far from being negligent, was endeavoring by the exercise of immediate care to avert collision. In his attempt to avert disaster, Wanless was legally privileged to act in reliance and upon the assumption that appellee would perform his duty of care to keep to the right half of the highway.

California Vehicle Code, Section 525.

As stated in

Gornstein v. Priver, 1923, 64 Cal. App. 249 at 259,

"The general rule is that one to whom a duty of care is owing by another has the right to assume that the person who owes such duty will perform it; and in the absence of reasonable ground to think otherwise, it is not negligence on the part of the one to whom the duty is owing to assume that he will not be exposed to a danger which can come to him only through a violation of that duty by the person owing it."

Appellant respectfully submits that Wanless, in all the circumstances of this case, as conclusively established by the photographs in evidence, was not negligent.

II.

APPELLEE WAS GUILTY OF CONTRIBUTORY NEGLIGENCE.

The photographic evidence presented by appellee in the trial Court (Plaintiff's Exhibits 17-20 inclusive) has been discussed at length above from the standpoint of its proof that Wanless was not negligent. This same photographic evidence may be considered for its proof of appellee's contributory negligence. It is respectfully submitted that this photographic evidence shows that the collision was virtually head on (supra). Even the appellee in his own testimony conceded that the collision was head on (Tr. 211), if it be suggested that the photographs put in evidence by appellee, do not fully establish a head on collision.

If it is true that this collision was virtually head on, and this cannot be disputed, it follows inevitably that

appellee must have been negligent in the manner of executing his left-hand turn, since he could not have been making his left turn as dictated by California Vehicle Code 540(b). To have executed, or even to have commenced to execute, a proper left-hand turn from the Fremont four-lane highway, would have made it physically impossible for appellee to be hit head on, as he was, in the northernmost lane of the highway. (Finding V, supra.) It follows, further, the only reasonable inference from this evidence is that appellee's execution of his left-hand turn was careless and constituted contributory negligence in all of the circumstances of this case.

California Courts have long followed the rule that contributory negligence, even in the slightest degree, shall bar a plaintiff from recovery for a defendant's negligence. A long line of decisions in California has established the rule that

> "The failure of a person to perform a duty imposed upon him by law is negligence per se and if such negligence proximately contributes to his injury, he cannot recover."
>
> *Hardin v. Sutherland,* 106 C.A. 479 (289 P. 900).

It is respectfully submitted that the physical evidence presented by plaintiff to the trial Court conclusively establishes that Penders was violating 540(b) of the California Vehicle Code at the time of the accident. Such violation constituted contributory negligence on Penders' part and would bar him from any recovery in the suit at bar. It was error for the trial

Court not to find that Penders was guilty of contributory negligence. It follows, furthermore, that the trial Court's finding that Penders was *not* negligent (Finding XVI, Tr. 26) was directly contrary to the evidence presented and cannot stand.

As a matter of law, upon a finding of contributory negligence, it is submitted, appellee cannot recover in the instant case.

> "The plaintiff is held not to be entitled to recovery if he was 'guilty of contributory negligence, however slight', even though the defendant may have been 'most to blame'.
>
> "Any negligence on the part of the plaintiff which contributes even in a slight degree to the accident is contributory negligence, barring a recovery; and it is error for the Court not to instruct the jury to such effect."
>
> 2 *Cal. Jur. Supp.* 170, referring to *Markham v. Hancock Oil Co.,* 2 C.A. (2d) 392, 37 Pac. (2d) 1087, and other cases.

In

> *Texas Co. v. Hood, et al.,* 161 F. (2d) 618 (C.C.A.-5)

nvolving a truck and auto collision, the Court said (620):

> "The circumstances sought to be shown by plaintiff, even if all were admitted to be proven, are entirely consistent with the positive, uncontradicted and unimpeached testimony of the three eye witnesses as to how the collision occurred, where two equally justifiable inferences may be drawn from the facts proven, one for and one

against the plaintiff, neither is proven and the verdict must be against him who had the burden of proof * * *. Moreover, where the plaintiff's right of recovery depends upon the existence of a particular fact being inferred from proven facts, such inference is not permissible in the face of the positive and otherwise uncontradicted testimony of unimpeached witnesses whose testimony is consistent with the facts actually proven and which uncontradicted evidence shows affirmatively that the facts sought to be proven did not exist * * * no lawful finding can be made of its existence * * *".

It is submitted, in view of the only reasonable inference that may be drawn from appellee's photographic evidence in this case, appellee's contributory negligence makes the trial Court's Finding XVI (Tr. 26) that appellee was *not* negligent, constitutes reversible error.

III.

THE TRIAL COURT AWARDED EXCESSIVE DAMAGES.

Appellant readily admits that the question of excessive damages seldom provides a persuasive basis for reversal. Nevertheless, there is little doubt that an Appellate Court may be constrained to reverse a judgment awarding damages that are patently excessive.

Fornwalt v. Reading Co., Dist. Ct. E.D. Pa., 1948, 79 F. Supp. 921;

Barrett v. S. P. Co., 1929, 207 C. 154.

In the instant case it is submitted that excessive damages were granted appellee, at least as to a portion of the judgment. Appellant concedes that the following three items of damages awarded by trial Court are not properly subject to the criticism that they are excessive: damages for (1) medical care for Walter L. Penders; (2) medical care for Flora Penders; (3) loss of the Penders automobile.

The general damages awarded Walter L. Penders for injuries to himself and for the death of his wife, however, are clearly excessive. Penders' injuries resulted in a permanently affected wrist and leg. (Tr. 49-54.) There is no testimony as to what effect these physical handicaps had upon Walter L. Penders' earning capacity. The record shows that besides being almost 80 years of age at the time of the accident, Walter L. Penders was *retired*. (Tr. 240 and Defendant's Exhibit "E", Deposition of Walter L. Penders; Defendant's Exhibit "B", Vehicle Accident Report, refers to Walter L. Penders as "retired".) Despite this total lack of evidence as to any loss of livelihood, the trial Court awarded Walter L. Penders $15,000 general damages for injuries to himself. (Tr. 28.) Even allowing for the existing inflationary trend, this award appears extraordinarily high and without evidence to justify it.

Mondine v. Sarlin, 1938, 11 C. (2d) 593 at 599, involved a case of severe burns, necessitating extensive surgery. The Court cut in half the trial Court's award of $20,000. See also

Hallinan v. Prindle, 1936, 17 C.A. (2d) 656.

The questionable award of $15,000 to Walter L. Penders for the disability to himself is made more questionable when we compare this award with the award to Walter L. Penders for the loss of his wife. For the limited permanent disability suffered by his wrist and leg, $15,000; for the loss of his wife, $15,000. The coincidence of these awards bespeaks an arbitrary award in either or both. Certainly the loss of one's wife must be more serious than an impairment of one's left wrist and knee action. Does it not follow that a higher award should be given for the loss of the priceless intangibles of marriage than for mere physical discomfort? It is obvious, we believe, that the general damages here awarded in strict equality for two widely divergent losses—losses which are as far apart in degree of pain and suffering as we can imagine, by their very equality suggest their arbitrary nature. It may be said that the equality of the two awards for general damages is mere coincidence, and in fact, may by some formula be mathematically calculated as correct, considering all the factors involved in each of the two losses suffered by Walter L. Penders. Conceding that the awards were merely coincidental, it should be pointed out that just as the award for physical injury to Walter Penders was excessive in its own right, so it would appear that $15,000 for the loss of Mrs. Penders is excessive in its own right, for Mrs. Penders was as aged as Mr. Penders at the time of her death, taking as true the evidence most complimentary to Mrs. Penders, which places her age at seventy-seven when injured and eighty upon her death

n 1949. (Tr. 71, testimony of Dr. Dormody, Mrs. Penlers' attending physician.) Mrs. Penders' life expecancy, absent any evidence of some monetary estimate f the pecuniary worth of her presence in Mr. Penlers' household, would hardly appear to justify the ward here of $15,000. The usual theory of damages n tort claims bases damages upon the ground that the ward compensates the injured person for the injury uffered, i.e., restoring him as nearly as possible to his ormer position or giving him some pecuniary equivaent. (Restatement of Torts, Sections 901, 903, 905, 06.) Appellant respectfully submits that an application of this most widely accepted theory of damages esults in the conclusion there is no sound basis in fact r inference for the amount of the award here given s general damages for the death of Mrs. Penders, appellee's wife.

CONCLUSION.

In view of the foregoing, it is respectfully urged hat the judgment of the Honorable District Court hould be reversed.

Dated, San Francisco, California,
March 31, 1950.

Respectfully submitted,

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United States Attorney,
Attorney for Appellant.